IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 516

THE OHIO OIL COMPANY, A CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

W. HUME EVERETT,
HAROLD H. HEALY,
P. O. Box 120,
Casper, Wyoming,
Attorneys for Petitioner.

Of Counsel:
A. M. GEE,
HAL W. STEWART,
CALVIN A. BROWN,
Findlay, Ohio.

THE BYRNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

INDEX.

Statutes Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

THE OHIO OIL COMPANY, A CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, The Ohio Oil Company, prays for a Writ of Certiorari requiring that this cause be certified to this Court for determination.*

*The opinions delivered in the courts below appear: Circuit Court of Appeals, 10th Circuit (R. 387): 163 Fed. 2d 633; District Court of the United States, District of Wyoming, (R. 24): 65 Fed. Supp. 991.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On August 25, 1920, the Secretary of the Interior, acting pursuant to authority granted by the Oil Lands Leasing Act of Feb. 25, 1920, 41 Stat. 437, issued a lease, under Section 19 thereof, to petitioner's assignors, embracing lands in the Lance Creek Field, Wyoming (R. 301). So far as is material here, the lease provided for a royalty on all oil produced of 12½%. On November 10, 1937, with the approval of the Secretary of the Interior, a unit agreement was entered into by petitioner and other operators of oil and gas leases in the Lance Creek Field (R. 256). Said agreement unitized the operations of the parties signatory thereto and provided, pursuant to the Act of August 21, 1935 (Appendix, p. 11), as to each of the Government leases covered thereby, including petitioner's lease, that same "shall continue in force beyond the 20 years specified in the lease, and until the termination of said agreement; * * *" (R. 272).

This case involves royalties due the Government under said lease for the period from July 1, 1939 to April 1, 1941, (R. 26) the Government contending that petitioner must account for royalty oil produced during said period on the basis of an assumed value of $1.02 per barrel, as fixed and determined by the Secretary of the Interior (R. 38), rather than on the basis of 77¢ per barrel, actually received for said oil by petitioner, which was the only and highest price obtainable for such oil in the Lance Creek Field and which was the price for which petitioner was bound to sell 95% of its oil under written contracts dating back to August 5, 1936 (R. 36).

With the exception of a period of one year during which royalty oil was received in kind, the Government at all times prior to May, 1939, accepted without objection, as payment in full for its royalty under said lease, the amounts paid to it by petitioner each month, based upon the prices received by petitioner for the royalty oil (R. 38). In May, 1939, the Secretary of the Interior, proceeding *ex parte*, fixed and established, effective July 1, 1939, for the purpose of computing royalties due the Government on crude oil produced from Federal land in the Lance Creek Field, a minimum field price, for such oil of $1.14 per barrel (R. 227). Petitioner and other operators in the Lance Creek Field protested this action and in February, 1941 (R. 293) such minimum field price (effective as of July 1, 1939) was fixed at $1.02 per barrel by the Secretary under his ruling (R. 294) that he "has authority to fix, for purposes of Government royalty computation, a *reasonable* minimum valuation for crude oil produced from Federal lands * * *" and that "under the terms of the mineral leasing act, the regulations thereunder and the terms and provisions of the leases here involved, the authority to fix a *reasonable* minimum price for Government royalty oil exists and has been validly exercised in this case." (Emphasis ours unless otherwise indicated.) Such price so fixed was still 25¢ per barrel higher than the price of 77¢ per barrel, for which petitioner had in good faith contracted to sell its oil and which the undisputed evidence in this case shows was the highest price received in a fair and open market, not only for the oil produced from this lease but for all oil produced from the Lance Creek Field (R. 39-40). The period in controversy ended April 1, 1941, at which time the Government elected to receive its royalty oil in kind (R. 37).

Petitioner refused to pay the difference between 77¢ and $1.02 per barrel of Government royalty oil produced from

its lease during the period from July 1, 1939, to and including March 31, 1941, which amounted to $9,186.96 (R. 38-39), until threat was made in April, 1942, by the Department of the Interior that unless such payment was forthcoming suit would be instituted to recover such amount and to cancel petitioner's lease (R. 329). Said sum of $9,186.96 was paid by petitioner to the Government under protest and was accepted by the Government upon its express agreement that said money would be deposited in a special trust fund and "held in that account pending a final judicial determination as to the authority of the Secretary of the Interior to require the payment of the money as royalty due under the lease," and that "should it be finally determined judicially that such authority is not vested in the Secretary the money held in the trust fund account, or so much thereof as you may be entitled to receive, will be repaid to your company" (R. 299, 300, 381 and 384).

Petitioner thereupon brought the present suit under the Tucker Act, 24 Stat. 505, 28 U. S. C. A. Sec. 41 (20), in the District Court of the United States for the District of Wyoming to recover from the United States such sum of $9,186.96 so paid (R. 1).

A trial was had to the court which resulted in findings of fact and conclusions of law favorable to petitioner's position (R. 35) and judgment was rendered by the trial court in favor of petitioner and against the Government for the above sum (R. 42).

The Government appealed the case to the United States Circuit Court of Appeals for the Tenth Circuit wherein such judgment was reversed.

The Circuit Court of Appeals, in so doing, held, *inter alia*, that:

1. "The *original Mineral Leasing Act of 1920*, which *authorized* the granting of *mineral leases* on the public

domain, *also blueprinted their terms and conditions.*" (R. 393.)

2. "* * * *neither the original Act, nor the lease contract executed in pursuance thereof, purport to authorize the Secretary to fix and determine the minimum value of the royalty oil. On the contrary, the legislative history of the Act indicates a deliberate purpose to withhold such power from the Secretary.* See Congressional Record Vol. 58, p. 4733-4735, 66th Congress, 2d Session." (R. 394.)

3. "* * * in all of his transactions with the lessee, *the Secretary* acted for and on behalf of the Government in a proprietary capacity, and that his *contractual powers were measured by the basic enabling Act and amendments thereto.*" (R. 396.)

4. "We have no doubt of the power of the Secretary, acting in the public interest, to require as a condition to his approval of the unitization and extension agreement, *that all development and operation thereunder should be subject to operating regulations* which were in effect when the agreement was made, * * *." (R. 397.)

5. By entering into the Lance Creek Unit Agreement (R. 256) petitioner agreed to be bound by Section 3(e) of the Oil and Gas Operating Regulations, promulgated and approved by the Secretary of the Interior, effective December 1, 1936, which reads in part as follows:

> "The value of production, for the purpose of computing royalty, in the discretion of the Secretary * * * may be calculated on the highest price per barrel, paid or offered * * * at the time of production in a fair and open market for the major portion of like quality oil * * * produced and sold from the field where the leased lands are situated; but under no conditions shall the value of any of said substances for the purpose of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale therof or *less*

than such reasonable minimum price as shall be determined by said Secretary." (R. 396.)

and that said Regulation 3(e) was valid and subsisting and by its terms authorized the Secretary to determine the reasonable minimum value of the royalty oil. (R. 397.)

6. "* * * the oil in question was sold * * * for a uniform price of 77¢ per barrel under * * * contract * * *" and "* * * that the producers were obligated to and did sell and deliver approximately sixteen million barrels of oil thereunder, * * *." (R. 399) and "We have no doubt of the bona fides of the contract, * * *." (R. 400.)

7. "From the record before us, we are convinced that the Secretary's determination of reasonable minimum value of the royalty oil is not unlawful, inequitable, arbitrary and unreasonable, * * *." (R. 401.)

It is petitioner's contention that the Circuit Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Honorable Court. (Supreme Court Rule 38. 5. (b).)

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U. S. C. A. Sec. 347 (a). The judgment of the Circuit Court of Appeals was entered September 10, 1947, (R. 401); an order was entered September 18, 1947, extending time for filing petition for rehearing to and including October 15, 1947, (R. 401); Petition for Rehearing was filed October 15, 1947, (R. 422), and was denied October 22, 1947, (R. 423).

QUESTIONS PRESENTED.

1. Whether the Secretary of the Interior may, by regulation, create in himself the power to fix and determine the reasonable minimum value of royalty oil under a lease issued pursuant to the Oil Lands Leasing Act of Feb. 25, 1920, as amended, (41 Stat. 437), where said Act not only does not purport to grant any such power but the legislative history thereof indicates a deliberate purpose to withhold such power from the Secretary.

2. Whether the Secretary of the Interior may arrogate unto himself the power to fix and determine the reasonable minimum value of royalty oil, by requiring Government lessees to adopt a departmental regulation to that effect as a part of a unit agreement, which to become effective under the Oil Lands Leasing Act, as amended, must have his approval (see p. 11, Appendix); and, if so, whether properly construed, the Lance Creek Unit Agreement (R. 256) incorporated therein Section 3(e) of the Oil and Gas Operating Regulations in effect on December 1, 1936.

3. Whether, if such power to fix and determine the reasonable minimum value of Government royalty oil be conceded, the Secretary of the Interior may validly fix the value of such oil at $1.02 per barrel regardless of the fact that the undisputed evidence shows that 77¢ per barrel was all that was received for it and all other oil from the Lance Creek Field in bona fide sales in a fair and open market, and require petitioner to account to the Government on the basis of such higher figure.

SPECIFICATIONS OF ERROR TO BE URGED.

1. The Court below erred in failing to hold invalid that portion of Section 3 (e) of the Oil and Gas Operating Regulations in effect December 1, 1936, which purports to grant to the Secretary of the Interior the power to fix and determine the reasonable minimum value of Government royalty oil.

2. The Court below erred in holding that the Secretary of the Interior could validly acquire the power to fix and determine the reasonable minimum value of Government royalty oil, by requiring as a condition to his approval of the Lance Creek Unit Agreement that provision therefor be included in such agreement (R. 397).

3. The Court below erred in holding that by the terms of the Lance Creek Unit Agreement there was incorporated therein, by reference, Section 3 (e) of the Oil and Gas Operating Regulations (R. 397).

4. The Court below erred in failing to hold that the minimum value of $1.02 per barrel, as fixed and established by the Secretary of the Interior, was arbitrary and unreasonable as a matter of law and that the sum of $9,186.96 was illegally exacted from petitioner.

REASONS FOR GRANTING PETITION.

We have here a situation where there is not only no Federal Statute expressly authorizing the Secretary of the Interior to fix and determine the reasonable minimum value of Government royalty oil, but the legislative history of the

Oil Lands Leasing Act indicates a deliberate purpose to withhold such power from the Secretary (Congressional Record Vol. 58, pp. 4733-4735, 66th Congress, 2d Session). Yet the Secretary proceeds in this case to fix and determine such value basing his right to do so on a regulation he himself promulgated. In carrying out this asserted power, he disregarded the actual conditions facing operators in the Lance Creek Field and required petitioner to account to the Government for the value of its royalty oil on the basis of $1.02 per barrel when such oil in a fair and open market was worth no more than 77¢ per barrel.

The asserted power, which has been sustained by the judgment of the Circuit Court of Appeals, to elect to take the value of Government royalty oil and to be the sole judge of the value of that oil, is so drastic and of such far reaching consequences to the many individuals, firms and corporations holding oil and gas leases on Government lands, including petitioner, that final word on the subject should come from this Honorable Court, which to date has not passed upon the questions herein presented.

It is respectfully submitted that this petition should be granted.

W. Hume Everett,
Harold H. Healy,
P. O. Box 120,
Casper, Wyoming,
Attorneys for Petitioner.

Of Counsel:
A. M. Gee,
Hal W. Stewart,
Calvin A. Brown,
Findlay, Ohio.

APPENDIX.

It is petitioner's contention, supported by the trial court (R. 32) and by the Circuit Court of Appeals (R. 394), that neither the original Oil Lands Leasing Act (41 Stat. 437) nor any amendment thereto, has authorized or empowered the Secretary of the Interior to fix the minimum value or price of royalty oil; consequently petitioner deems it unnecessary and improper to set forth such Act herein in its entirety. It is to be noted that Section 19 of such Act, under which petitioner's lease was issued, has never been amended.

In connection with consideration of Question No. 2 and Specification of Error No. 2 above, petitioner is quoting the pertinent portions of Section 17 of said Act as amended August 21, 1935, c. 599, Sec. 1; 49 Stat. 676; 30 U. S. C. A. Sec. 226.

* * * * *

"The Secretary of the Interior, for the purpose of more properly conserving the oil or gas resources of any area, field, or pool, may require that leases hereafter issued under any section of this Act be conditioned upon an agreement by the lessee to operate, under such reasonable cooperative or unit plan for the development and operation of any such area, field, or pool as said Secretary may determine to be practicable and necessary or advisable, which plan shall adequately protect the rights of all parties in interest, including the United States:

* * * * *

"Leases issued prior to the effective date of this amendatory Act shall continue in force and effect in accordance with the terms of such leases and the laws under which issued: PROVIDED, That *any such lease that*

has become the subject of a cooperative or unit plan of development or operation, or other plan for the conservation of the oil and gas of a single area, field, or pool, *which plan has the approval of the Secretary of the Department* or Departments *having jurisdiction* over the Government lands included in said plan as necessary or convenient in the public interest, *shall continue in force beyond said period of twenty years until the termination of such plan;* AND PROVIDED FURTHER, That said Secretary or Secretaries shall report all leases so continued to Congress at the beginning of its next regular session after the date of such continuance.

"Any cooperative or unit plan of development and operation, which includes lands owned by the United States, shall contain a provision whereby authority, limited as therein provided, is vested in the Secretary of the department or departments having jurisdiction over such land to alter or modify from time to time in his discretion the rate of prospecting and development and the quantity and rate of production under said plan. The Secretary of the Interior is authorized whenever he shall deem such action necessary or in the public interest, with the consent of lessee, by order to suspend or modify the drilling or producing requirements of any oil and gas lease not subject to such a cooperative or unit plan, and no lease shall be deemed to expire by reason of the suspension of production pursuant to any such order.

* * * * *

"Whenever the average daily production of the oil wells on an entire leasehold or on any tract or portion thereof segregated for royalty purposes shall not exceed ten barrels per well per day, or where the cost of production of oil or gas is such as to render further production economically impracticable the Secretary of the Interior, for the purpose of encouraging the greatest ultimate recovery of oil and in the interest of conservation of natural resources, is authorized to reduce the royalty on future production when in his judgment

the wells cannot be successfully operated upon the royalty fixed in the lease. The provision of this paragraph shall apply to all oil and gas leases issued under this Act, including those within an approved cooperative or unit plan of development and operation."

Such Amendatory Act of August 21, 1935, (c. 599, Sec. 2, 49 Stat. 679, 30 U. S. C. A. 223a (b)) also provided:

* * * * *

"(b) Nothing contained in this Amendatory Act shall be construed to affect the validity of oil and gas prospecting permits or leases previously issued under the authority of the said Act of February 25, 1920, as amended, and in existence at the time this amendatory Act becomes effective, *or impair any rights or privileges which have accrued under such permits or leases.*"

INDEX

CITATIONS

774381—48

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 516

THE OHIO OIL COMPANY, A CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 387–401) is reported in 163 F. 2d 633.

JURISDICTION

The judgment of the circuit court of appeals was entered on September 10, 1947 (R. 401). On September 18, 1947, an order was entered extending through October 15, 1947 the time for filing a petition for rehearing (R. 401). The petition for rehearing, filed on October 15, 1947 (R. 422), was denied on October 22, 1947 (R. 423). The

petition for a writ of certiorari was filed on January 5, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, where the United States and a lessee of public oil land enter into a contract agreeing that, for the purpose of computing the Government's royalties, the value of the royalty oil shall not be less than the reasonable minimum value determined by the Secretary of the Interior, the lessee is bound by the honest determination of the Secretary fixing the value, even though such amount is higher than that actually received by the lessee when it sold the oil.

STATEMENT

In August 1920, the oil and gas lease in controversy, covering 160 acres of public land in the Lance Creek oil field in Wyoming, was issued pursuant to the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437 (30 U. S. C. 181, et seq.). Two years later, in 1922, the original lessee assigned the lease to The Ohio Oil Company (R. 301–315). The lease was for a term of 20 years, expiring August 25, 1940, with a preferential right of renewal for successive periods of 10 years "upon such reasonable terms and conditions as may be prescribed by the lessor, unless otherwise provided by law at the time of the expiration of such periods" (sec. 1, R. 302). Ohio was obligated to pay a

graduated percentage of the oil produced from the lease, but not less than 12½ percent (R. 303–304).

In each of the years 1930, 1935, and 1937, discoveries were made in progressively deeper sands, increasing the potential of the field from 165 barrels per day to 1,000 barrels per day in 1930, then to 3,000 barrels per day in 1935, and finally to 13,000 barrels per day in 1937 (R. 93–94). When the prolific deep sands were discovered in May 1937, Ohio's lease had only three years and three months more to run before it expired by its own terms. In the latter part of that year, Ohio and the owners of other leases in the Lance Creek field procured the approval of the Secretary of the Interior to a cooperative or unit plan agreement submitted by them for the development and operation of the field (R. 256–273).

The agreement incorporated by reference the applicable provisions of the Mineral Leasing Act, as amended (30 U. S. C. 226; 184). It extended the term of Ohio's lease which was nearing expiration, for so long as oil or gas was produced in paying quantities from any part of the land included in the unit plan (Par. XV, R. 268). Ohio agreed that royalty should be computed and paid in accordance with the rules and regulations approved by the Secretary, and in effect on December 1, 1936 (Par. I, R. 257; Par. X, R. 266). One of those regulations, Regulation 3 (e), provided that for the purpose of computing royalty, the

value of production should not be less than the reasonable minimum value determined by the Secretary.[1] In addition, Ohio consented to the conformation of the royalty requirements of the lease to the provisions of the agreement (Par. XIII (b), R. 267).

On May 31, 1939, more than a year after the effective date of the unit agreement, the Secretary of the Interior issued an order stating that, effective July 1, 1939, for the purpose of computing royalties due to the Government, the value of crude oil produced from federal land in the Lance Creek field was to be four cents per barrel above the price regularly posted by major purchasers of crude oil of 40° A. P. I. gravity in the Mid-Continent area (R. 226–227). At that time the posted price at Lance Creek was 77 cents per barrel, while the Mid-Continent price was $1.10 per barrel. Under the Secretary's determination royalties at Lance Creek would be computed on the basis of $1.14 per barrel, not 77 cents per barrel (R. 141–145).

Timely notice of the Secretary's action was sent to The Ohio Oil Company (R. 384–385), which requested a hearing with reference to the May 31, 1939 value order (R. 385–386). A hearing was held. The proceedings at the hearing were stenographically reported. Ohio introduced exhibits. After the hearing, but before decision,

[1] For full text of Regulation 3 (e), see Appendix, p. 13.

Ohio was furnished with a memorandum, prepared in the Geological Survey, discussing the factors underlying the Secretary's determination. Ohio filed a response to the memorandum. After full consideration of all the evidence adduced, a decision was entered on February 13, 1941, and a formal order filed modifying the May 31, 1939, order so as to fix the value of Lance Creek oil for the purpose of computing royalties, at eight cents per barrel below the price regularly posted by the major purchasers for crude oil of 40° A. P. I. gravity in the Mid-Continent area (R. 293–295; 30 CFR, 1941 Supp., Part 222, 6 F. R. 1355). Expressed in figures the value of $1.14 per barrel fixed by the May 31, 1939 order was reduced to $1.02 per barrel by the modification of February 13, 1941. A motion for rehearing by Ohio was denied after full consideration expressed in a written opinion (R. 295–299).

This case is concerned with only the period from July 1, 1939, the effective date of the minimum value order, to April 1, 1941, when the Government commenced taking its royalty in oil. On October 28, 1941, the Department of the Interior made demand on Ohio for the payment of $9,186.96, representing the difference between royalties paid by Ohio computed on posted prices at Lance Creek field (77 cents per barrel) and royalties computed on the basis of the Secretary's minimum valuation order as modified ($1.02 per

barrel) (R. 327–328). When its demand was ignored, Interior threatened legal proceedings to cancel the lease unless the royalties were paid. Ohio then paid on condition that the money be held in a trust fund pending a judicial determination of the Secretary's authority to determine the minimum value of the oil for the purpose of computing royalties (R. 380–383). Interior agreed to this (R. 300–301).

Thereafter, suit was brought in the United States District Court for the District of Wyoming. The case presented three primary questions: (1) whether the district court had jurisdiction under the Tucker Act (28 U. S. C. 41 (20)); (2) whether the Secretary was authorized to fix the minimum value of the royalty oil; and (3) if the Secretary was authorized, whether the $1.02 value he fixed was arbitrary and unreasonable. The trial court sustained its jurisdiction, held that the Secretary was without power to fix the minimum value of the royalty oil, and concluded that the value fixed by the Secretary was "unlawful, inequitable, arbitrary and unreasonable" (R. 40–41). The same questions were presented on appeal to the circuit court of appeals (R. 388).

The circuit court of appeals sustained the jurisdiction of the district court under the Tucker Act, 28 U. S. C. 41 (20) (R. 388–392). However, on the merits, the circuit court of appeals held that Ohio and the United States had entered into a

contract (unitization and extension agreement) under which they had agreed that the value of production for the purpose of computing royalties was not to be less than the minimum value as determined by the Secretary; that the parties were free to contract on the subject and that the contractual power thus conferred on the Secretary was not in excess of his statutory power or unauthorized by law (R. 395–397). The circuit court of appeals pointed particularly to the Act of March 4, 1931, c. 506, 46 Stat. 1523–1525, amendatory of sections 17 and 27 of the Mineral Leasing Act (30 U. S. C. 226; 184), and to the Act of August 21, 1935, c. 599, sec. 1, 49 Stat. 674, 677, amendatory of section 17 of the Mineral Leasing Act (30 U. S. C. 226) as specifically authorizing the Secretary to require as a condition to his approval of the agreement extending the life of Ohio's lease and making it a part of the unit plan, that all development and operation under the unit plan be subject to the operating regulations in force when the agreement was made. It held that it was not improper for Ohio specifically to agree that the royalty to the United States on the oil produced under the lease as renewed should be computed and paid in accordance with the rules and regulations approved by the Secretary, and it further held as valid and subsisting, Regulation 3 (e), providing that for royalty-computing purposes the value of the oil was not to be less than

the reasonable minimum value determined by the Secretary (R. 397). The circuit court of appeals also held that the trial court erred in finding that the Secretary's $1.02 minimum value order was arbitrary inasmuch as the trial court had disregarded the factual basis upon which the Secretary had based his determination and had conducted a trial *de novo* on the question of value (R. 399–400). Accordingly, the circuit court of appeals reversed the judgment of the district court (R. 401).

ARGUMENT

1. The lease (R. 301–311) and unit plan agreement (R. 256–284) together constitute the contract between The Ohio Oil Company and the United States. The unit plan agreement recites that royalties "shall be computed and paid in accordance with rules and regulations approved by the Secretary * * *" (R. 266) and that "all development and operation under this agreement shall be subject to the operating regulations * * * in effect on December 1, 1936 * * *" (Par. I, R. 257). Regulation 3 (e), one of the operating regulations the contract thus made applicable (see Appendix, p. 13), provides that for the purpose of computing royalties the value of production shall not be less than the reasonable minimum value determined by the Secretary. In addition, Ohio specifically consented to the alteration of the "royalty require-

ments" of its lease and "the regulations in respect thereto to conform said requirements to the provisions of this agreement" (Par. XIII (b), R. 267). Thus, by contract the parties agreed that for royalty-computing purposes, the value of production was not to be less than the reasonable minimum value determined by the Secretary.

2. There is clear statutory authority for the Secretary so to contract. The Act of March 4, 1931, c. 506, 46 Stat. 1523–1525, amending sections 17 and 27 of the Mineral Leasing Act (30 U. S. C. 184, 226),[2] authorizes Government lessees in an oil or gas field to join in a unit plan for the development or operation of the field where the Secretary of the Interior approves. It provides that any lease becoming the subject of such a plan was to continue in force "until the termination of such plan." In unequivocal language, the 1931 Act empowers the Secretary, in his discretion, with the consent of the lessees "to establish, alter, change, or revoke" "royalty requirements of such leases" and to make such regulations with reference to the leases with the consent of the lessees "as he may deem necessary or proper to secure the proper protection of such public interest."

[2] The circuit court of appeals placed primary reliance on the specific provisions of this statute as the source of the Secretary's power to contract as he did with Ohio (R. 395–397). Yet the petition makes no mention of this statute either in the text or in the appendix.

As previously stated (supra, pp. 8–9), the Secretary, with Ohio's consent, did alter the royalty requirements of the lease by making the 1936 regulations with respect to the computation of royalties a part of the unit agreement. This contract, whereby the parties agreed the Secretary might determine the reasonable minimum value of royalty oil, easily falls within the authority of the statute.

3. Petitioners assign as error the failure of the circuit court of appeals to hold that the Secretary's finding of $1.02 value was arbitrary and unreasonable (Pet. 8).[3] There is no claim or finding in the case that the Secretary's determination of $1.02 per barrel is fraudulent or dishonest. From that standpoint, therefore, the determination is binding on Ohio. *Goltra* v. *Weeks,* 271 U. S. 536, 547, 548; *Kihlberg* v. *United States,* 97 U. S. 398, 401, 402; *Gillioz* v. *Webb,* 99 F. 2d 585, 587 (C. C. A. 5).

If Ohio wished to attack the Secretary's value determination as unreasonable, it was obligated first to show the basis of the Secretary's action. This it did not do. It failed to put into the record the evidence on which the Secretary's finding, as shown by its recitations, is based (R. 293–295). Accordingly, on the record in this case the peti-

[3] Petitioner offers no reasons or argument in support of this or the other specifications of error it lists in its petition (Pet. 8).

tioner is in no position to demonstrate, even if it could, that the order was not founded on reason. Cf. *Miss. Valley Barge Co.* v. *United States,* 292 U. S. 282, 286; *Edward Hines Trustees* v. *United States,* 263 U. S. 143, 148.

What the trial court did was to proceed *de novo* on the identical question of value determined by the Secretary. In this the trial court erred. As pointed out by the circuit court of appeals (R. 400): "We do not think the trial court was at liberty to disregard or ignore the factual basis upon which the Secretary proceeded, nor was it at liberty to substitute its concept of value for that of the Secretary. We should remember that the contract authorized the Secretary, not the court, to determine the reasonable minimum value of the royalty oil."

Ohio insisted the 77-cent price posted at Lance Creek field was controlling, but the circuit court of appeals could find no justification for the 25-cent differential since the record before it showed that "oil of inferior grade and quality, produced in the same country, and transported to the same markets under similar conditions as the Lance Creek oil, sold at $1.02 [the value fixed by the Secretary] per barrel" (R. 400).

CONCLUSION

The questions presented by the petitioner were correctly decided by the circuit court of appeals, and no conflict of decisions is present. The peti-

tion for a writ of certiorari, therefore, should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
A. DEVITT VANECH,
Assistant Attorney General.
MARVIN J. SONOSKY,
Attorney.

JANUARY 1948.

APPENDIX

Excerpts from Department of the Interior, *Oil and Gas Operating Regulations Applicable to Lands of the United States, Etc.,* Revised November 1, 1936.

SECTION 3—MEASUREMENT OF PRODUCTION AND COMPUTATION OF ROYALTIES

* * * * *

(e) *Price basis for computing royalties.* The value of production, for the purpose of computing royalty, in the discretion of the Secretary of the department having jurisdiction over the leasehold, may be calculated on the basis of the highest price per barrel, thousand cubic feet, or gallon, paid or offered (whether such price is established on the bases prescribed in these regulations or otherwise) at the time of production in a fair and open market for the major portion of like-quality oil, gas, natural or casing-head gasoline, propane, butane, and all other hydrocarbon substances produced and sold from the field where the leased lands are situated; but under no conditions shall the value of any of said substances for the purpose of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than such reasonable minimum price as shall be determined by said Secretary.

U. S. GOVERNMENT PRINTING OFFICE: 1948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 516

THE OHIO OIL COMPANY, A CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR REHEARING.

W. HUME EVERETT,
HAROLD H. HEALY,
P. O. Box 120,
Casper, Wyoming,
Attorneys for Petitioner.

Of Counsel:
A. M. GEE,
HAL W. STEWART,
CALVIN A. BROWN,
Findlay, Ohio.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX

CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 516

THE OHIO OIL COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE OUT OF TIME

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully requests leave to file the attached petition for rehearing out of time for the reason that counsel was not aware of the recent change in Rule 33 until after the attached petition had been forwarded to the Clerk of this Court.

Respectfully submitted,

W. HUME EVERETT,
P. O. Box 120,
Casper, Wyoming,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 316

THE OHIO OIL COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

MOTION FOR LEAVE TO FILE OUT OF TIME

W. HENRY HUNKER,
P. O. Box 120,
Casper, Wyoming,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

THE OHIO OIL COMPANY, A CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, The Ohio Oil Company, respectfully requests this Court to reconsider its decision handed down on February 9, 1948, denying petition for writ of certiorari in the above cause and in that connection says as follows:

Petitioner predicates its Petition for a Writ of Certiorari on the proposition that the United States Circuit Court of Appeals, Tenth Circuit, has decided important questions of Federal law, which have not been, but should be, settled by this Honorable Court. (Supreme Court Rule 38. 5. (b).) The decision of the Circuit Court of Appeals in the opinion of petitioner comes squarely within the purview of said Rule. If, in spite of the fact that Congress has intention-

ally withheld the granting of price-fixing power from the Secretary (see Congressional Record Vol. 58, pages 4733-4735, 66th Congress, 2nd Session), he can acquire same by the mere expedient of promulgating a departmental regulation, (thus, in effect, writing his own Act of Congress) approval of such assumption of authority should emanate from the highest Court in the land.

Realizing that this Court has many like petitions to consider, counsel for petitioner presented a compendious statement of the case so as to demonstrate that this is a case for the exercise of judicial discretion under said Rule 38. 5. (b). It was not our purpose to argue the merits of the case but to bring to this Court's attention the significance of the lower court's decision sustaining the asserted power of the Secretary of the Interior, proceeding under Federal law, to require an oil and gas lessee of Government land to pay the Government, as royalty, substantially more money than was received for such oil in admittedly bona fide sales in a fair and open market.

The amount of money involved here is of no particular consequence, but to petitioner the principle involved is of far-reaching significance. As we view this case, petitioner's property has been taken from it through the usurpation of power by an executive officer of the United States. Unless this Court intervenes, it can be expected that when it is to the advantage of the Government to do so, the Secretary of the Interior will again elect to take Government royalty oil in value and demand of petitioner and other Government lessees that it and they account to him for such oil on such basis as his judgment shall dictate, regardless of what price or prices such oil may actually bring on the market.

Under our system of government Congress is supposed to make the laws, and while, because of the complexities of our modern civilization, it has been found necessary to delegate to the executive branch the power to make rules

and regulations in order to more effectively carry out the mandates of Congress, yet we have not as yet come to the point where such law making powers have been entirely transferred to the executive branch. Congress intentionally withheld granting the Secretary of Interior the power to fix the minimum value of Government royalty oil. (R. 394.) By denying Ohio's petition for writ of certiorari, this Court leaves in effect the decision of the Circuit Court of Appeals holding Regulation 3(e) of the Department of Interior granting the Secretary of Interior such power to be *valid*. We believe the lower court erred and that petitioner has been illegally deprived of its property, contrary to the intent and purpose of the 5th Amendment to the Constitution.

Petitioner sincerely believes the Court has been misled by the distortion of facts and legal principles in respondent's opposing brief, and, as the quickness of the Court's decision after the filing of same did not permit the filing of a reply brief,[1] petitioner would briefly call the Court's attention to portions of said opposing brief.

Respondent would have this court believe that this case involves nothing more than a voluntary contract between the Secretary and petitioner, wherein petitioner agreed that the Secretary should have the exclusive power to determine the reasonable value of Government royalty oil, regardless of its actual market value (the amount petitioner actually received for such oil).

The portions of respondent's brief to which petitioner would particularly call the Court's attention are as follows:

1. Respondent's opposing brief states (p. 8):

1. Respondent's opposing brief was received at Casper, Wyoming, on February 4, 1948. Petitioner's reply brief was mailed to the printers on February 7, 1948, and this court denied the Petition for a Writ of Certiorari on February 9, 1948.

> "The unit plan agreement recites that royalties 'shall be computed and paid in accordance with rules and regulations approved by the Secretary * * *' (R. 266) and that 'all development and operation under this agreement shall be subject to the operating regulations * * * in effect on December 1, 1936, * * *' (Par. I, R. 257)."

but does not refer to or set forth the italicized phrase immediately following:

> "* * * *to the extent that such regulations are not inconsistent with the specific terms of the leases or of this agreement, particularly in the matter of rates of royalty* * * *." (R. 257.)[2]

nor to the significant paragraph XX (R. 270):

> *"Nothing in this agreement contained shall be construed as a waiver* by any party signatory hereto or consenting to this agreement *of the right to assert any legal or constitutional right or defense as to the validity or invalidity of any* law of the State of Wyoming, or of the United States, or *regulations issued thereunder in any way affecting such party,* * * *." (Emphasis ours unless otherwise indicated.)

It is petitioner's contention that the above quoted provisions of such unit agreement had the effect of incorporating therein *only valid regulations* of the Secretary of the Interior which were *not inconsistent* with the specific terms of the leases or the unit agreement. The provisions of the unit agreement can afford no comfort to the respondent unless the Secretary may legislate unto himself or assume power to determine the reasonable value of Gov-

---

2. Regulation 3(e) (page 13, Respondent's Brief) is wholly inconsistent insofar as same requires royalties to be paid for at "such reasonable minimum price as shall be determined by said Secretary" with the royalty provision of the oil and gas lease which requires Ohio "to pay * * * a royalty * * * for all oil * * * produced (of) 12½%."

ernment royalty oil, by the mere promulgation of a departmental regulation unaided by statutory enactment. Resort cannot be had to the unit agreement to render vaild that which is invalid. (See question No. 1, page 7 of Petition for Writ of Certiorari.)

It is also petitioner's contention that, absent statutory authorization, the Secretary cannot acquire such power by requiring as a condition to his approval of the unit agreement that provision therefor be included in such agreement. (See question No. 2, page 7 of Petition for Writ of Certiorari.) Congress in this instance intentionally withheld such authority. When Congress has intended to grant authority of like nature, it has specifically so provided by law. (See Act of August 30, 1935, c. 825, 49 Stat. 1011, 40 U. S. C. 276a, wherein provision is made for the inclusion in construction contracts of provision "stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar * * *.") In the absence of similar provisions in the Mineral Leasing Act, and amendments thereto, (and there is none) the Secretary of the Interior is without authority to include provisions in contracts granting himself the power to fix the minimum value of royalty oil. (See *Gillioz* v. *Webb*, 99 Fed. 2d 585, 586, (C. C. A. 5); *U. S.* v. *Morley Construction Co.*, 17 Fed. Supp. 378, 388, (W. D. N. Y.).) The inclusion of any such provision in a contract, without statutory authorization, "is of no weight."

2. Respondent's opposing brief states (p. 9):

> "Thus, by contract the parties agreed that for royalty-computing purposes, the value of production was not to be less than the reasonable minimum value determined by the Secretary."

and

> "There is clear statutory authority for the Secretary so to contract."

but so arranges its presentation as to attempt to leave the impression that the Secretary could by contract write out of existence the specific provision of the lease which required Ohio "to pay * * * a royalty * * * for all oil * * * produced (of) 12½%," and the specific saving clause of the Act of August 21, 1935 (quoted p. 12, Petition for Writ of Certiorari) which will not permit the impairment of that or any other right granted by the lease.

3. Respondent's opposing brief states (p. 10):

> "There is no claim or finding in the case that the Secretary's determination of $1.02 per barrel is fraudulent or dishonest. From that standpoint, therefore, the determination is binding on Ohio."

The quoted statement is an attempt to keep the Court from answering the very important Federal Question 3 (p. 7 of Petition for Writ of Certiorari), which has not been, but should be, settled by this Court; in that the statement would lead the Court to believe that petitioner must, as a prerequisite to obtaining relief, use words (such as the above statement invites) which would be mere legal conclusions from facts properly pleaded and proved. Such statement would have this court approve a legal fraud by disregarding fundamental legal principles (recognized by the Secretary himself in all except the last phrase of his Rule 3(e)) by affirmation of a situation in which the "reasonable minimum price as shall be determined by said Secretary" is greater than "the gross proceeds accruing to the lessee from the sale" of oil and is greater than "the highest price per barrel * * * paid or offered * * * at the time of production *in a fair and open market for* the major portion of like quality oil * * * produced and

sold from *the field where the leased lands are situated;*" (see Rule 3(e), p. 13, Respondent's Brief).[3]

Assuming the Secretary possesses the asserted power, petitioner submits that in exercising same he cannot arrive at a figure which ignores the actual conditions facing operators in the Lance Creek Field. We cannot determine what went on in his mind; we can only judge him by his words and actions. The mere fact that he might honestly believe in the rightfulness of his acts (which respondent nowhere claims) is no answer to petitioner's contention that it has been illegally deprived of $9,186.96 by his arbitrary and capricious action of demanding $1.02 per barrel for oil worth no more than 77¢ per barrel in a fair and open market.

4. Respondent's opposing brief also states (p. 10):

> "If Ohio wished to attach the Secretary's value determination as unreasonable, it was obligated first to show the basis of the Secretary's action."

in an attempt to cover up the true ultimate result and effect of such "value determination"; the uncontroverted evidence herein establishes a market value of 77 cents per barrel at Lance Creek and therefore the "value determination" of the Secretary becomes arbitrary and unreasonable as a matter of law without any showing except that

3. In the case of *United States* v. *General Petroleum Corporation* (D. C. Calif.) 73 F. Supp. 225, the United States did not dispute the meaning of "value" (see paragraphs 3, 4, p. 235). "'Value', in common usage, means 'reasonable market value'; that price which a product will bring in an open market, between a willing seller and a willing buyer. *The parties do not dispute this interpretation of the term.* Thus the lessees are obligated to return to the government the specified percentage of the *reasonable market value* * * * of the oil produced."

(P. 249) "Months of trial were consumed in presenting evidence upon the single issue of whether or not there was an open market for oil at Kettleman Hills," but in the case at bar the fair and open market at Lance Creek is not controverted. (R. 4 and R. 12.)

such "value determination" was in excess of the market value. The ultimate result, reached by the Secretary, of itself shows there was no factual basis or support in law or equity for same. The cases cited by respondent on this point are wholly inapplicable. The cases of *Mississippi Valley Barge Co.* v. *U. S.*, 292 U. S. 282, 286; *Edward Hines, Trustees* v. *U. S.*, 263 U. S. 143, 148, were Interstate Commerce cases, where the district courts are given the express statutory authority to "enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission". (28 U. S. C. 46.) In such cases the Court could no more determine that the decision was not supported by the evidence without the whole evidence of the trial before it, than this Court could do likewise in the instant proceedings. But petitioner did not *appeal* from the Secretary's decision. This is a suit against the United States, on the theory that it, through its servant, the Secretary, acted arbitrarily.

A study of this record will disclose that the Secretary in making his finding of value had available for his consideration not only the testimony presented by petitioner and others but secret reports made to him by the Geological Survey (R. 61) and none of them were in the "transcript" which the Secretary's reporter made up and delivered to petitioner. This Court will take judicial notice that it is well established practice in matters of this sort for the Secretary to seek information wherever he can find it. Petitioner in this sort of "Star Chamber proceeding" had no way (and has no way now) of determining just what "evidence" the Secretary relied upon in reaching his decision on value, much less introduce same into the record in this case. *All* it could do was to present to the trial court all evidence available which was relevant on the question of market value. This it did. *The Government offered nothing on market value.* Granting the trial court would not be justified in ignoring the factual basis on which the

Secretary proceeded, yet as the only evidence presented to the court by both sides showed without peradventure that the only market available for oil produced in the Lance Creek Field was at a price of 77 cents per barrel, it is submitted that the trial court was absolutely justified in holding that the Secretary's minimum value of $1.02 per barrel was "in excess of the value thereof and in excess of the price Plaintiff received therefor, was unlawful, inequitable, arbitrary and unreasonable." (R. 41.)

Right and justice does not permit going outside of a fair and open market to determine the value of a commodity sold therein. The Secretary's $1.02 valuation is therefore arbitrary and unreasonable as a matter of law and that being the necessary conclusion, it could be said, for the benefit of respondent, that the Secretary's action is dishonest and fraudulent in law. The fair and open market at Lance Creek is admitted in the pleadings; moreover, the uncontroverted evidence herein conclusively proves that the value of oil at Lance Creek was 77 cents per barrel, consequently the requirement that Ohio pay royalty on the basis of $1.02 per barrel is arbitrary, capricious and fraudulent as a matter of law because there can be no rational basis to support it and because there is no difference of opinion as to the existence of a fair and open market at Lance Creek.[4]

---

4. "*Where personal property is without market value*, then the law allows the next best evidence to be given to ascertain its value. In such cases, evidence as to cost and other considerations which may affect value or which tend to show its worth, actual, real, or intrinsic, is admissible. *It is necessary, however, before such proof may be given, that it appear that the property had no market value; in other words, lack of market value is a necessary condition to the admissibility of evidence of intrinsic or actual value,* • • •." 20 Am. Jur. 339.

"It has been held that *if there is no open market* in the place where an article ordinarily would be sold, then the market value of such article in the nearest open market, less cost of transportation

5. Respondent's opposing brief states (p. 11):

> "Ohio insisted the 77-cent price posted at Lance Creek field was controlling, but the circuit court of appeals could find no justification for the 25-cent differential since the record before it showed that 'oil of inferior grade and quality, produced in the same country, and transported to the same markets under similar conditions as the Lance Creek oil, sold at $1.02 (the value fixed by the Secretary) per barrel.' (R. 400.)"

The record does not support either Government counsel or the circuit court of appeals in the intended impression left by this statement. There were no "markets" away from Lance Creek to which resort could be had because there was a fair and open market at Lance Creek through which 16,000,000 barrels of oil was sold at 77 cents per barrel. There is nothing in the record showing that there was an "oil of an inferior grade and quality" sold at Lance Creek for $1.02 per barrel and it is wholly irrelevant what prices may have been obtained in other "markets." There is nothing in the record which would permit the receipt in evidence of any testimony of a market price or value other than at Lance Creek, Wyoming, because the necessary condition to the admissibility of lack of fair and open market at Lance Creek had not (and could not) have been shown.[5]

---

to such open market, becomes the market value of the article in question." (*U. S.* v. *General Petroleum Corp., supra*, p. 263.)

"Words 'arbitrarily' and 'capriciously' are used merely to characterize conclusion not supported by substantial evidence or contrary to substantial competent evidence." *Ostler* v. *Industrial Commission of Utah*, 84 Utah 428, 36 P. 2d 95.

5. See Wigmore on Evidence, 3rd Ed., Sec. 463:

> "When the conduct of others indicating the nature of a salable article consists in offering this or that sum of money, it creates the phenomena of value, so-called. For evidential purposes, Sale-Value is nothing more than the nature or quality of the article as measured by the money which others show themselves willing to lay out in purchasing it. Their offers of money not merely indicate the value; they are the value; i.e.

Petitioner contends that the trial court reached a correct result and that the Circuit Court of Appeals erroneously reversed its judgment. It is a matter of public importance that this court determine (1) to what extent an official of the Executive Department of our Government may create in himself power which Congress had intentionally withheld, and (2) whether, if the power to fix and determine the reasonable minimum value of Government royalty oil could be conceded, the Secretary of the Interior may validly fix the reasonable minimum value of such oil at an amount in excess of the amount actually received for it by a Government lessee in a fair and open market. This Court should reconsider its decision and grant said Petition for Writ of Certiorari.

Respectfully submitted,

W. Hume Everett,
Harold H. Healy,
P. O. Box 120,
Casper, Wyoming,
Attorneys for Petitioner.

Of Counsel:
A. M. Gee,
Hal W. Stewart,
Calvin A. Brown,
Findlay, Ohio.

Since value is merely a standard or measure in figures, those sums taken in net potential result are that standard."

And at Sec. 717:

"Value is, of course, the rate at which an exchange would in fact be made at this moment by the purchasing and selling community; hence a knowledge of what an article ought to exchange for is not a knowledge of value,—at least, in the sense in which Courts regard it. Nor is a knowledge of the various qualities and uses of an article sufficient, if it stops short of including the exchangeable rate which these qualities actually give it."

CERTIFICATE OF COUNSEL.

The undersigned attorney for petitioner The Ohio Oil Company does hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay and that the intervening circumstance of substantial or controlling effect on this Court was the perversion and distortion of facts and law presented in respondent's opposing brief to which petitioner was not permitted to make a timely reply contrary to Rule 38.4.(a) of this Court.

Moreover, another substantial ground for granting its petition for writ is available to petitioner, although not previously presented, to-wit:

> There is a direct conflict between the decision of the Tenth Circuit Court of Appeals in this case and the decision of the Eighth Circuit Court of Appeals in the case of Barnsdall Refining Corporation v. Cushman-Wilson Oil Co. (97 Fed. 2d 481), on the question of what is meant by the term "value". The Eighth Circuit Court of Appeals held that "value" in common usage, means reasonable *market* value (that price which a product will bring in an open market, between a willing seller and a willing buyer); the Tenth Circuit Court of Appeals held herein that "value" does not mean reasonable *market* value.

W. HUME EVERETT,
P. O. Box 120,
Casper, Wyoming,
Attorney for Petitioner.